(1)

86-894 Case No:

Supreme Court, U.S.
FILED
DEC 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE UNITED STATES SUPREME COURT

Term: October, 1986

DAVID J. HELDSTAB,
Appellant

-vs-

City of Milwaukee,
Appellee

ON APPEAL FROM THE SUPREME COURT AND THE COURT OF APPEALS OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT

David J. Heldstab, pro se
710 E. Chambers Street
Milwaukee, WI 53212
1-414-263-0866

50 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

JURISDICTIONAL STATEMENT

. THE QUESTIONS PRESENTED BY THE APPEAL

1. Can the City of Milwaukee force a citizen to decorate his exterior wood trim with paint ostensibly to achieve wood preservation when paint is not a wood preservative? And is the enabling City of Milwaukee ordinance 51.32(3a) repugnant to the Constitution?*

2. Did the Court of Appeals for the State of Wisconsin respond properly and accord and protect due process when presented with the following allegations?:

   a. that this appellant was denied trial below.
   b. that this appellant never entered any nolo contendere plea before the hearing Judge below, rather, the prosecutor for the city entered the plea for a defendant.
   c. that a default judgement was improperly taken against this appellant when the prosecutor failed to serve notice of motion for application of Judgement and this appellant was never notified of hearing date.
   d. that the hearing Judge below failed to address this appellant personally to determine whether the nolo plea was made voluntarily and with understanding of the nature of the charge and potential punishment.

3. Did the Court of Appeals err in refusing to consider constitutional issues when presented with overwhelming probability of the unconstitutionality of an ordinance? and, where no adequate opportunity to raise these issues was available below where this appellant was denied trial?

*text of all constitutional provisions, statutes and ordinances at pp. 1-4 appendix

4. Did the Court of Appeals err in not requiring the City to meet its burden of showing the constitutionality of its ordinance when a First Amendment attack was brought against it and where the case law presented said it must?
5. Did the Court of Appeals err when it asserted that there was no evidence in the record that this appellant meant to exercise his First Amendment rights of Freedom of Expression and Freedom of political speech?
6. Did the Court of Appeals err in not following and applying the test laid down in Clark Oil and Refining Corp. v. Tomah, 30 Wis 2d 547 when presented with overwhelming evidence that the ordinance in question was without rational basis?
7. Was the "does not exist" treatment accorded by the Court of Appeals to the 14th Amendment improper classification argument of this appellant adequate?
8. Did the Wisconsin Supreme Court err in refusing to enlarge this appellant's time in which to file a petition for review when a copy of the opinion of the Court of Appeals was never sent to appellant? And, is 808.10 Wis. Stats. as applied constitutional?
9. Should the Court of Appeals have seen the obvious that the ordinance was not really intended to protect housing or wood stock of

9. con't.
the city and hence applied the criteria laid down in Caledonia v. Racine Limestone Co., 266 Wis 475, 63 N.W. 2d 697?

10. Did the Court of Appeals err in affirming the denial of the hearing court to vacate and reopen the judgment? Should the court of appeals have considered the motion as one to withdraw the alleged nolo plea?

11. Did the court of appeals err in affirming the denial of the hearing court to vacate and reopen the judgment for mistake, inadvertance, surprise or excusable neglect?

12. Did the court of appeals err when it ruled that the ruling of the hearing court was not based largely on aesthetics and hence did not deny this appellant an opportunity to present expert testimony on the point?

13. Did the court of appeals err when it held that the Law of Nuisance does not apply to an ordinance violation case when the principle invoked—"only a public nuisance may be punished by a municipality in the exercise of its police power"—was itself declared in an ordinance violation case i.e. City of Milwaukee v. Milbrew Inc., 240 Wis 527, 3 NW 2d 386?

14. Did the court of appeals err when it asserted that this appellant's attorney entered a no contest plea for him by mail? And did the hearing court find this appellant guilty and enter a judgment on January 1, 1985?

JURISDICTIONAL STATEMENT

15. Did the Court of Appeals err in not inquiring into the allegation that the City of Milwaukee retaliated against this appellant for appealing to that Court?

16. Did the Court of Appeals err in failing to respond to a very strong odor of misconduct, bias, and prejudice?

17. Did the Court of Appeals err when it denied this appellant's motion that the appeal be decided by a 3-Judge panel when important constitutional issues were raised?

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TABLE OF AUTHORITIES

1. Caledonia v. Racine Limestone Co., 266 Wis 475, 63 NW 2d 697

2. City of Columbus v. Stubbs, 158 SE 2d 392

3. City of Milwaukee v, Milbrew Inc., 240 Wis 527, 3 NW 2d 386, 141 ALR 277

4. Clark Oil and Refining Corp. v. Tomah, 30 Wis 2d 547

5. Hicks v. Miranda, 95 S.Ct. 2281, 422 U.S. 332,

6. Huffman v. Pursue, Ltd., 95 S.Ct. 1200, 420 U.S. 592, rehearing den. 95 S.Ct. 1969, 421 U.S. 971

7. McCarthy v. U.S., 394 U.S. 459, 89 S.Ct. 1166

8. Super Tire Engineering Co. v. McCorkle, 550 F2d 903, cert. den. 98 S.Ct. 106, 434 U.S. 827, rehearing den. 98 S.Ct. 753, 434 U.S. 1025

TABLE OF AUTHORITIES

9. State v. Cecchini,
124 Wis 2d 200, 368 NW 2d 830

10. U.S. ex rel. Wojtycha v. Hopkins,
517 F2d 420

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D. The case was not recommended for publication in the official or unofficial reports.

E. GROUNDS FOR INVOKING THE JURISDICTION OF THIS COURT.

The appeal here arises from an alleged municipal building code violation, hearings on which were had in the Circuit Court of Milwaukee County in October and November of 1985. An appeal was taken to the Court of Appeals on December 12, 1985, and there decided adversely to this appellant on July 9, 1986. This appellant never learned of this decision until August 15, 1986 and was forced to move the Supreme Court of the State of Wisconsin for an enlargement of time in which to file a petition for review there. The motion was denied on September 16, 1986. The Notice of Appeal to this Court was filed with the Clerk for the Court of Appeals and Supreme Court of the State of Wisconsin by mail on November 14, 1986. A copy was also filed with the Clerk of the Circuit Court, Milwaukee County, by mail on November 14, 1986. This Notice of Appeal was also filed with the Clerk of this Court with attached proof of service (affidavit) on November 15, 1986. Another Notice of Appeal with attached proof of service was filed with the above mentioned state Court clerks, by mail on November 20, 1986.

This appellant invokes the jurisdiction of this Court pursuant to 28 U.S.C.sections 1257(2), 2103 and 2106.

JURISDICTIONAL STATEMENT

The City of Milwaukee is attempting to force me to decorate the wood trim on my property with paint pursuant to their ordinance 51.32(3a):

> "All exterior wood surfaces shall be reasonably protected from the elements and against decay by paint or other approved protective coating applied in a workmanlike manner."

The City of Milwaukee has gained a Judgement against me under this ordinance and is attempting to fine me $300. or in the alternative to confine me for 10 days in the County jail.

The validity of this ordinance has been directly drawn into question below where this appellant has assailed this ordinance as unconstitutional and repugnant to the Constitution especially as to the First and Fourteenth Amendments.

This appellant asserts that he has appeal here as of right because the constitutional validity of an ordinance has been directly drawn into question and has been assailed by him in the highest Court of the State available to him as unconstitutional. This appellant asserts that his attack was specially set up, was timely, and not able to have been decided on any independent and adequate state grounds. Though the Wisconsin Court of Appeals attempted to evade the federal constitutional questions, this appellant asserts that the federal questions had to have, of

necessity, been decided in order to have adjudicated the rights of the parties. Super Tire Engineering Co. v. McCorkle, 550 F2d 903, cert. denied 98 S.Ct. 106, 434 U.S. 827, rehearing denied 98 S.Ct. 753, 434 U.S. 1025; Hicks v. Miranda, 95 S.Ct. 2281, 422 U.S. 332; Huffman v. Pursue, Ltd., 95 S.Ct. 1200, 420 U.S. 592, rehearing denied 95 S.Ct. 1969, 421 U.S. 971; U.S. ex rel. Wojtycha v. Hopkins, 517 F2d 420. Also, in a Georgia case an ordinance almost identical to the Milwaukee ordinance was declared null and void in City of Columbus v. Stubbs, 158 SE2d 392.

The constitutional provisions involved in the case are the First and Fourteenth Amendments (sec.I) set out here in that order:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

JURISDICTIONAL STATEMENT

> "...the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A CONCISE STATEMENT OF THE CASE

This appellant's property at 723 East Chambers St. in the City of Milwaukee was cited for building code violations per complaint of an enemy neighbor on July 5, 1983. Attorney Russell Bohach caused the case to be removed to the Circuit Court for purposes of a jury trial scheduled for February 16, 1984. Attorney Bohach was dismissed and the case languished until January 8, 1985 when appellant allegedly entered a plea of no contest. This appellant offered to comply with the order if given until Labor Day, 1985 and if the fine would be stayed. Respondent agreed. This appellant fulfilled his agreement to comply by applying not paint, but WELDWOOD WOODLIFE WOOD PRESERVATIVE, a clear, penetrating, non-filmforming liquid——the application of which would not be readily apparent after drying. This appellant obtained permission to use this compound at a hearing before the Standards and Appeals Commission of the City of Milwaukee on Jan. 17, 1985. This appellant carefully chose his words when

he agreed to "comply" and fully planned and expected to go to trial and launch an attack on the ordinance should the City reject his efforts. The City then took a default judgment against me on August 30, 1985 claiming that a return hearing had been set for that date. This appellant was never notified or learned of this return date until he received a postcard informing him that a default judgment had been entered against him. The prosecutor for the City connived with the court clerk in setting this date and not informing this appellant and also illegally entered my plea for me. The prosecutor also failed to serve notice of motion for application of judgment as required by 806.02(1) Wis. Stats:

> "...any defendant appearing in an action shall be entitled to notice of motion for judgment."

This argument was advanced on affidavit and in open court testimony when this appellant moved to vacate and reopen the judgment. This appellant charges prosecutorial misconduct in this case. From a short and simple bargaining session with the City's prosecutor with only the court clerk present, the City, with the connivance of the clerk, has somehow tampered with the record and is making out that this appellant entered a no contest plea and was found guilty in some illusory trial. Even the hearing court judge states at p. 12 of the transcript of the October 9th proceedings:

"...there is no trial....the trial is over. You've already been found guilty."

Similarly, on the strength of the court of appeal's belief that this so-called "trial" occurred on January 1, 1985 wherein this appellant was supposedly found guilty, it held or ruled against me on all of the following points:
a) that this appellant deserved no notice of the August 30th "adjournment" date because he was notified at this "trial". b) that this appellant deserved no notice of motion for application of judgment because he was "in effect" notified at this "trial" that the City would so move.
c) that a judgment of guilty entered while the defendant is in court does not operate as a default judgment. d) that this appellant being forced to litigate from a default position was "harmless".
e) ruled that the hearing court was not required to address this appellant personally regarding the plea; need not have considered this appellant's motion to vacate as one to withdraw the alleged nolo plea; and was correct in refusing to vacate for mistake or excusable neglect--all because this appellant was supposed to have been present at this 'trial' and knew what he was doing.
f)held that this appellant was remiss for not moving to reopen at this "trial".

There must be some record and a transcript of this "trial", none has ever been brought forward.

The Court of Appeals then made a startling statement. It stated that this appellant's attorney entered the nolo plea for him by mail and that

this plea was justification for the hearing court to find that this appellant admitted to non-compliance.

This appellant asserts that this statement of the Court of Appeals is evidence of judicial misconduct and a complete disregard for due process and essential fairness resulting in a loss of jurisdiction rendering the decision there null and void. The statement is absolutely baseless. This appellant never stated it; the City never offered this; there is nothing in the record anywhere that any attorney ever entered a nolo plea for me. The statement apparently was just made up.

This appellant's first motion to vacate and reopen the judgment came on for hearing on October 9th and 15th. These hearings marked the first time that this appellant was before any judge in this case. The motion was denied and this appellant moved to reconsider. This motion came on for hearing and was denied on November 21, 1985.

The hearing court refused to vacate and reopen even though it needed proof that this appellant did not comply before entry of a default judgment as required by Wis. Stats. 806.02(5).
Also, Wis. Stats. 840.07 provides:

"...no default Judgement may be granted unless evidence supporting the Court's findings and conclusions is in the record."

The Court did not have this evidence when the default Judgement was entered. Also, the Court did not personally address this appellant as to the voluntarinous of the plea as provided for in 971.08 Wis. Stats. nor did it apprise this appellant of his constitutional rights of due process before accepting the nolo plea as was required by the United States Supreme Court in McCarthy v. U.S., 394 US 459, 89 S.Ct. 1166 and in State v. Cecchini, 124 Wis 2d 200, 368 NW2 830 The attack on the legality of the entry of the default Judgement mentioned in this paragraph was made on appeal on brief.

This appellant then brought an appeal in the Court of Appeals on December 12, 1985. A motion that the appeal be decided by a 3-Judge panel was brought at this time also. The motion apparently was mislaid somewhere and the appeal was set for decision by a 1-Judge panel. This appellant protested and the clerk resurrected the motion and submitted it to the Court. The motion was denied on June 9, 1986. The appeal was decided adverse to this appellant on July 9, 1986. No copy of the opinion was ever sent to this appellant, and was not seen by him until August 19, 1986— some 40 days after the decision and only after his 30 day time grant in which to file a petition

for review to the Supreme Court had elapsed. This appellant inquired of the Clerk as to why he never received a copy of the opinion. She said that she had sent it out, but that "it must have gotten lost in the mail." This appellant then moved the Supreme Court for an enlargemant of time in which to petition for review there. This motion was denied on September 16, 1986. This appellant then filed Notice of Appeal to this Court as mentioned above on November 15, 1986.

The stage in the proceedings where the questions sought to be reviewed were raised, the manner of so raising, and the response of the Court will now be addressed. Wisconsin law permits the Court of Appeals to entertain a constitutional attack raised for the first time on appeal and the appellate Court Judge noted this in his opinion. However, an attempt will be made to identify the stage of the proceedings wherein the question was raised. The 17 questions raised can be conveniently placed in 2 groups:

I. The attack on the constitutionality of the ordinance on 6 different grounds.

1. Ordinance based on aesthetics.
2. Ordinance without rational basis.
3. Real intent of ordinance concealed.
4. In contravention of Law of Nuisance.
5. Improper classification. (14th Amend.)
6. Violates First Amendment free expression.

II. The Fourteenth Amenment procedural due process issues of:

1. The illegality of the entry of a default Judgement for:
   a.) no notice of hearing date.
   b.) no notice of motion for Judgement.

2. Improper entry of plea and failure of Court to inquire into circumstances.

3. Denial of trial.

4. Denial of enlargement of time to petition for review in the Supreme Court.

Group I.

As noted earlier, this appellant specially set up and planned an attack on the ordinance. This was announced to the hearing Court in open Court at least twice at the October 9 hearing. The Court acknowleged this at a third place in the October 15 proceedings. Then, in the motion to reconsider brought on for hearing on November 21, 1985, this appellant inserted a disclaimer as to the intent to attack the ordinance. After consultation with an attorney, a plan to attack the ordinance in another case was developed that seemed preferable to attacking in the instant case from a default position with little prospect of gaining plenary trial. This plan did not materialize and this appellant resumed his attack on appeal.

The attack on the ordinance because it was based on aesthetic considerations was initiated in the hearing Court on brief and developed more

fully in appellant's Appeals Court brief. The attack on the ordinance as not being grounded on a sound rational basis was initiated below in open Court testimony and developed further on brief in the Court of Appeals. The attack on the ordinance for concealment of its real intent was initiated below on brief in the hearing Court and again on brief in the Court of Appeals. The attack on the ordinance for being in contravention of applicable Wisconsin Law of Nuisance was begun below in the hearing Court on brief and in open Court testimony and again on brief in the Court of Appeals. The attack on the ordinance on the 14th Amendment equal protection grounds because the ordinance creates an improper dual classification was initiated on brief in the Court of Appeals. The greater part of the open Court testimony below in the hearing Court centered around my choice of a wood preservative to comply and whether this appellant prepared the wood surfaces properly and performed the job in a workmanlike manner. So, in this sense the 1st Amendment attack on the ordinance as being violative of Freedom of Expression was begun below, but a specific 1st Amendment attack was first brought on brief in the Court of Appeals.

Group II.

The 14th Amendment procedural due process issues of illegality of entry of the default Judgement because of failure to give notice of

hearing date and failure to serve notice of motion for application of default Judgement were initiated below on affidavit in the hearing Court and again on brief in the Court of Appeals. The due process issues of improper entry of the nolo plea and failure of the Court to address personally thereon were raised on brief in the Court of Appeals. The due process issue of denial of trial was raised on brief in the Court of Appeals. The questions pertaining to the conduct of the Wisconsin Courts was of course raised here for the first time with one exception: The due process issue of the failure of the Court of Appeals to send timely notice of decision and a copy of the opinion was raised on affidavit in the Wisconsin Supreme Court.

All of the Courts of this State i.e. the hearing Court (Circuit), the Court of Appeals, and the Supreme Court rejected all of my arguments on all points.

H. Reasons why the questions presented here merit plenary consieration:

This appellant has brought an attack in the State Courts and here on a City of Milwaukee ordinance contending it to be violative of guaranteed constitutional freedoms. This appellant further asserts that this noxious ordinance is a frontal assault on the very scheme of ordered liberty— alone coloring the questions presented here with

ufficient gravamen.

No municipality in the possession of competent cientific knowledge as to the real nature and roperties of paint and as to the basic concepts f wood preservation could ever, in conscience, eep such oppressive legislation on its books. his knowledge has been offered to the City in he form of an affidavit*of a highly trained cientist with a doctorate in Chemistry on the taff of the most prestigious laboratory of its ind in the world—The Forest Products Laboratory f the United States Department of Agriculture t Madison, Wisconsin. The City of Milwaukee knows hat it cannot traverse Dr. Martins Kalnins' in- ictment of the ordinance for scientific inval- ility, yet the City perversely refuses to remove and seems fully prepared to subject this app- llant and other citizens to many more years of use under this illegal instrument. This appell- nt asserts that the indictment of Dr. Kalnins nders the ordinance without rational basis. ur constitutional scholars and our Jurisprudence as stated that when such is the case, a statute an ordinance cannot be the law. This appell- nt asserts that the City of Milwaukee ordinance der attack here may even be facially unconstit- ional.

Besides these important constitutional quest- ns raised here, appellant believes that some ry grave due process deficiencies have occurred

pears in my Wis. appeals ct. reply brief(appendix) be cert. and sent up.

low which merit plenary consideration here.
is appellant has written the clerks of the
ate Courts requesting that certain portions
he transcript and the three briefs submitted
n appeal) of the record be certified and sent
the clerk of this Court at or before the time
submission of this Jurisdictional Statement—
eling that they will be necessary to a proper
derstanding of the case. As to further briefing
d oral argument: Some of the points raised in
e 17 questions have never been briefed and may
quire it in the future e.g. those relating to
e conduct of the Court of Appeals and the Sup-
me Court. Oral argument may not be necessary.

APPENDIX

THE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED IN THE CAS:

1. The First Amendment to the U.S. Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The Fourteenth Amendment to the U.S. Constitution (sec. I):

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. Sec. 1257: State Courts; appeal; certiori

Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

4. 28 U.S.C. sec. 2103: Appeal rom State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari.

"If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs."

5. 28 U.S.C. sec. 2106: Determination

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

APPENDIX

WISCONSIN STATUTES (in order of appearance)

1. 808.10:

"A decision of the Court of Appeals is reviewable by the Supreme Court only upon a petition for review granted by the supreme court. The petition for review shall be filed in the supreme court within 30 days of the date of the decision of the court of appeals."

2. 809.41: Rule(Motion for a 3-judge panel or hearing in county of origin.)

"(1) If an appellant or a petitioner requesting the court to exercise its supervisory jurisdiction or its original jurisdiction to issue prerogative writs desires the matter to be decided by a 3-judge panel, the appellant or petitioner shall file with the copy of the notice of appeal required by s. 809.10(1)(a) or with the petition requesting the court to exercise its supervisory jurisdiction or its original jurisdiction to issue prerogative writs a motion for a 3-judge panel. Any other party must file a motion under this rule for a 3-judge panel within 10 days of service of the notice of appeal or with the response to the petition. The failure to file a motion under this rule waives the right to request the matter to be decided by a 3-judge panel. A motion for a 3-judge panel in a case in which the State is a party shall also be served upon the attorney general. The Attorney general may file a response to the motion within 7 days of service.

(2) The chief judge may change or modify his decision on a motion that the matter be decided by a 3-judge panel at any time prior to a decision on the merits of the appeal or petition.

(3) Whether or not a motion for a 3-judge panel has been file, the chief judge may order that an appeal or petition be decided by a 3-judge panel at any time prior to a decision on the merits of the appeal or petition.

APPENDIX

4) If an appellant desires that the appeal be heard in the county where the case or action iginated under s. 752.31(3), the appellant shall le with the copy of the notice of appeal requir- by s.809.10(1)(a) a motion requesting a hearing the county of origin. Any other party must file motion requesting a hearing in the county of igin within 10 days of service of the notice of peal. The failure to file a motion under this le waives the right to request the appeal be ard in the county where the case or action originated.

806.02(1) Default judgment:

"(1) A default judgment may be rendered as provided in subs.(1) to (4) if no issue of law fact has been joined and if the time for joing issue has expired. Any defendant appearing in action shall be entitled to notice of motion r judgment.

806.02(5):

A default judgment may be rendered against any fendant who has appeared in the action but who ils to appear at trial. If proof of any fact is cessary for the court to render judgment, the urt shall receive the proof.

840.07 Default judgments.

No default judgment may be granted unless evidce supporting the court's findings and conclusns is in the record.

971.08: Pleas of guilty and no contest; withdrawal thereof.

(1) Before the court accepts a plea of guilty or no contest, it shall: (a) Address the fendant personally and determine that the plea made voluntarily with understanding of the nature the charge and the potential punishment if concted; and (b) Make such inquiry as satisfies it at the defendant in fact committed the crime charged.

APPENDIX

2) The court shall not permit the withdrawal of a plea of guilty or no contest later than 120 ays after conviction.

3) Any plea of guilty which is not accepted by the court or which is subsequently permitted be withdrawn shall not be used against the defendant in a subsequent action.

.....

ity of Milwaukee ordinance 51.32(3a):

All exterior wood surfaces shall be reasonably protected from the elements and against decay by paint or other approved protective coating applied in a workmanlike manner."

APPENDIX

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CIVIL DIVISION

CITY OF MILWAUKEE,
Plaintiff

CASE NO. 1-331775

vs.

ORDER

DAVID HELDSTAB,
Defendant

Defendant's motion for relief from judgment and from the Court's oral order made Oct. 15, 1985 having come on for hearing on November 21, 1985 before the undersigned, and defendant appearing pro se, and plaintiff appearing by Beverly Temple, Assistant City Attorney for Grant Langley, City Attorney, and the Court having heard arguments and being fully advised in the premises, and again finding that defendant had not complied with the order referred to in said motion,

IT IS ORDERED that defendant's said motion be, and the same is, hereby denied.

Dated at Milwaukee, Wisconsin this 9 day of December, 1985.

BY THE COURT

(s) Victor Manian
Circuit Judge

APPENDIX

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
CIVIL DIVISION

CITY OF MILWAUKEE, Plaintiff — CASE NO. 1-331775

vs.

DAVID HELDSTAB, Defendant — ORDER

Defendant's Motion to reopen and set aside judgment and its order made August 30, 1985 in the above case having come on for hearing before the undersigned on Oct. 9 and Oct. 15, 1985, and defendant appearing pro se and plaintiff appearing by Grant Langley its City Attorney, appearing by Beverly Temple, Assistant City Attorney, and the Court having heard arguments and having heard testimony and being fully advised in the premises; and having found that the defendant had not complied with the order of the plaintiff's building inspector involved herein;

IT IS ORDERED that defendant's said Motion be, and the same is, hereby denied.

Dated at Milwaukee, Wis. this 9th day of December, 1985.

BY THE COURT,

(s) Victor Manian

Circuit Judge

APPENDIX

District I

Office of the Clerk

COURT OF APPEALS OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, June 9, 1986

TO: Beverly Temple
Asst. City Attorney
841 N. Broadway
Milwaukee, WI 53202

David Heldstab
710 E. Chambers St.
Milwaukee, WI 53212

YOU ARE HEREBY NOTIFIED THAT THE COURT ENTERED THE FOLLOWING ORDER:

85-2315 - City of Milwaukee v. David Heldstab

Before Scott, C.J.

David Heldstab moves the court to appoint a three-judge panel to decide the appeal. The court concludes that the issue presented does not warrant appointment of a three-judge panel.

Upon the foregoing reasons,

IT IS ORDERED that the motion is denied.

Marilyn L. Graves
Clerk of Court of Appeals

APPENDIX

No. 85-2315

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

COURT OF APPEALS
DECISION
DATED AND RELEASED

JUL 9 1986

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

CITY OF MILWAUKEE,
Plaintiff-Respondent,

v.

DAVID HELDSTAB,
Defendant-Appellant.

NOTICE

This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

APPEAL from orders of the circuit court for Milwaukee county: VICTOR MANIAN, Judge. Affirmed.

MOSER, P.J. David Heldstab (Heldstab) appeals from an order denying his motion to reopen and set aside a default judgment taken against him by the City of Milwaukee (City), and from an order denying his motion for relief from judgment. Heldstab raises eleven issues on appeal, and this court affirms on all issues.

On July 5, 1983, the City of Milwaukee Department of Building Inspection (Department) issued and "Order to Correct Condition of Premises" and servid it on Heldstab. The order informed Heldstab that his property, a house located at the Milwaukee common address of 723 East Chambers Street, violated the Milwaukee Code of Ordinances and required that the defects be corrected within ninety days of service. Specifically, Heldstab violated

APPENDIX

sec. 51-32(3)(a) of the Milwaukee Code, which states that "(a)ll exterior wood surfaces shall be reasonably protected from the elements and against decay, by paint or other approved protective coating applied in a workmanlike manner." Heldstab failed to comply, and the City commenced a forfeiture action against him in municipal court. The case was removed to circuit court because Heldstab requested a jury trial. Heldstab then pled no contest and the trial court fined him $300 on January 1, 1985. The court gave Heldstab until August 30, 1985, to comply with the Department's order, at which time the fine would be reduced to $50.

On August 30, 1985, the City moved for and was granted a default judgment as to the $300 forfeiture because Heldstab had not complied with the order and had failed to appear in court. Heldstab moved to reopen and to set aside the judgment. After taking testimony, the court denied his motion. The trial court denied Heldstab's second motion to reopen and to set aside the judgment.

NOTICE

On appeal, Heldstab raises eleven issues. His first and third issues deal with notice. He argues that the trial court erred in failing to require the City to serve him with a notice of motion for application of judgment. He also argues that due process was violated when a default judgment was entered without notifying him. Heldstab misconstrues the facts.

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The judgment roll notes that at the January 1, 1985, hearing, the case was adjourned to August 30, 1985, at 8:30 a.m. to enter judgment. The record reflects that Heldstab was present in court when this information was given. He was thus given notice on January 1 that the case would be in court on August 30. He cannot complain that he was given no notice.

Similarly, on January 1 Heldstab was found guilty of not complying with the ordinance and fined $300. He was also notified at that time that $250 of the fine would be permanently stayed if he complied with the ordinance by August 30. Section 806.02, Stats., states in part that:

> (1) A default judgment may be rendered as provided in subs. (1) to (4) if no issue of law or fact has been joined and if the time for joining issue has expired. Any defendant appearing in an action shall be entitled to notice of motion for judgment.
>
> . . . .
>
> (5) A default judgment may be rendered against any defendant who has appeared in the action but who fails to appear at trial. If proof of any fact is necessary for the court to render judgment, the court shall receive the proof.

Despite the judgment roll's terming it a "default judgment", this court holds that a judgment of guilty entered while the defendant is in court does not operate as a default judgment merely because the concomitant fine is stayed until and imposed at a later date. When he was notified

that the case was adjourned to August 30, 1985, Heldstab was in effect notified that the City would move for judgment on that date if he had not complied with the ordinance. However, even if Heldstab was not formally notified of the City's motion, such failure was harmless where, pursuant to his motion to reopen, Heldstab had a chance to appear at later hearings and challenge the City's contentention of noncompliance. We thus affirm the trial court's decision on these two issues.

RELIEF FROM JUDGMENT

Heldstab argues that the trial court erred in refusing to relieve him from the judgment. He cites sec. 806.07(1)(a), Stats., as grounds for relief: "(1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons: (a) Mistake, inadvertence, surprise, or excusable neglect." Heldstab asserts that his failure to be notified of the August 30 appearance date was excusable neglect requiring that the judgment be vacated.

A circuit court's order denying a motion for relief under sec. 806.07, Stats., will not be reversed on appeal unless there has been a clear abuse of discretion. State ex rel. M.L.B. v. D.J.H. 122 Wis. 2d 536, 541, 363 N.W.2d 419, 422(1985). An appellate court will not find an abuse of discretion if the record shows that the circuit court exercised its discretion and that there is a

sonable basis for the court's determination. at 542, 363 N.W. 2d at 422. For a defendant be entitled to relief under sec. 806.07, he t demonstrate that the judgment was obtained inst him through excusable neglect and that has a meritorious defense to the action. er Construction, Inc. v. Ryan, 81 Wis 2d 463, , 260 N.W. 2d 700, 703 (1978). Excusable neg- t is the neglect that is the act of a reason- y prudent person under the circumstances and ot synonymous with neglect, carelessness or ttentiveness. Martin v. Griffin, 117 Wis. 2d , 443, 344 N.W. 2d 206, 209 (Ct.App. 1984) tation omitted).

ere the trial court determined that Heldstab led to show that the judgment was entered against because of excusable neglect. This court con- es that the trial court correctly denied stab's motion to reopen the judgment. The rd contains no evidence of excusable neglect eldstab's part. Moreover, he had his day in t and was given ample opportunity to present defense of compliance with the ordinance. Maier Construction at 471, 260 N.W. 2d at 704. court affirms the trial court.

NO CONTEST PLEA

eldstab argues that the trial court erred in ing to consider his motion to reopen the judg- as a motion to withdraw his no contest plea. lso contends that he should be allowed to

withdraw his plea as a matter of right because the court failed to address him personally to determine that the plea was made knowingly, voluntarily and with understanding of the nature of the charge and the potential punishment. This court rejects both argument.

After Heldstab requested a jury trial, Heldstab's attorney entered a no contest plea for him through the mail. On the basis of the plea, the trial court found Heldstab admitted that he had not complied with the ordinance. In considering Heldstab's motion to reopen, the court only considered that part of the judgment that was entered in default—that is, the imposition of the $300 fine because of Heldstab's continued noncompliance. Heldstab did not move to reopen, and the court was not required to consider, the court's original judgment of January 1, 1985, finding him guilty of noncompliance. Thus, the court was not required to construe Heldstab's motion as one to withdraw his no contest plea.

Heldstab contends that State v. Cecchini, 124 Wis. 2d 200, 368 N.W. 2d 830 (1985), requires that the trial court address him personally to determine whether his no contest plea was knowing, intelligent and voluntary. As of the date of this decision, Cecchini has been modified. See State v. Engert, No. 85-1179-CR (Wis. June 24, 1986). The requirement that the trial court undertake a personal colloquy with the defendant is now a statutory requirement under sec. 971.08, Stats.,

of the rules of criminal procedure. Id., slip op. at 10. A proceeding to enforce an ordinance and to recover a forfeiture is a civil action. See secs. 23.50(2) and 66.12(1), Stats., City of Neenah v. Alsteen, 30 Wis. 2d 596, 600-01, 142 N.W. 2d 232, 235 (1966). The violation of a municipal ordinance is not a crime, because an ordinance is not a state law, and the violation is punishable only by a forfeiture. See sec. 939.12, Stats. Regardless, Heldstab has not made an adequate prima facie showing that he did not knowingly, intelligently and voluntarily enter his plea. See Bangert, slip op. at 22. This court thus upholds the trial court's acceptance of Heldstab's no contest plea.

VIEW OF PREMISES

Heldstab asserts that the trial court erred in refusing to view the premises. Section 805.08(4), Stats., states that "(o)n motion of any party, the jury may be taken to view any property, matter or thing relating to the controversy between the parties when it appears to the court that the view is necessary to a just decision." A view of the property is thus discretionary with the trial court. The court here did not abuse its discretion in declining to view the house, since forty relevant photographs of the house's wooden trim, balconies, porches and eaves were already in evidence, from which the court could determine whether or not Heldstab had complied with the ordinance.

MUNICIPALITY'S POLICE POWER

Heldstab contends that no municipality should be able to invoke its police power to force a citizen to scrape peeling paint from the exterior wood trim of his or her house prior to decorating with paint. This court construes the issue as an attack on the ordinance's constitutionality.

The ordinance in question was held to be constitutional in Boden v. Milwaukee, 8 Wis 2d 318, 325, 99 N.W. 2d 156, 160 (1959). This court is bound by our supreme court's precedents. State ex rel. McCaffrey v. Shanks, 124 Wis. 2d 216, 221, 369 N.W. 2d 743, 747 (Ct.App. 1985). This court thus declines to find the ordinance unconstitutional.

AESTHETICS NOT A PROPER BASIS FOR POLICE POWER

Heldstab asserts that aesthetic considerations can never be a proper basis for the exercise of a municipality's police power. He contends that the trial court erred by basing its decision largely on aesthetic considerations without affording him an opportunity to present expert testimony on that point. Upon a review of the record, it is evident that while the trial court referred to Heldstab's house's unsightly appearance, the court decided that the house was not in compliance because the paint on the external wood trim continued to peel, and because the exterior wood surfaces were still exposed to the elements and to continued deterioration. Moreover, the uncontroverted testimony of the Department's building inspector indicated that the purpose behind the ordinance was not aesthetic appearances, but to protect the

housing or wood stock of Milwaukee. Thus, aesthetics played no part in either the City's exercise of police power in enacting the ordinance or the trial court's decision on the merits.

NUISANCE

Heldstab next contends that the trial court erred in failing to consider and apply the law of nuisance to this case. The ttial court declined to apply nuisance law because the case concerned a building code violation under a municipal ordinance, not a common law nuisance. This court agrees that the law of nuisance does not apply to an ordinance violation case. The court did not err.

FIRST AND FOURTEENTH AMENDMENT

Last, Heldstab argues that the trial court erred in failing to accord him proper first amendment protections of freedom of political expression and freedom of political speech. He argues that he applied a clear wood preservative to the exterior wood trim of his house not only to test the City's justification for enacting and enforcing the ordinance, but to protest an allegedly oppressive ordinance and to freely express himself in a lawful manner. Heldstab also contends that the ordinance impermissibly classifies citizens in violation of the fourteenth amendment. The trial court did not rule on these issues as they were not presented below.

Consideration of a constitutional issue raised for the first time on appeal is discretionary

with this court and will be done if it is in the best interest of justice to do so, if both parties have had the opportunity to brief the issue and if there are no factual issues that need resolution. In re Baby Girl K., 113 Wis. 2d 429, 448, 335 N.W.2d 846, 856 (1983) (citation omitted). However, this court will not entertain a constitutional issue raised for the first time on appeal unless there is some compelling reason for doing so. State v. Yellow Freight System, Inc., 101 Wis. 2d 142, 158, 303 N.W. 2d 834, 842 (1981) (citations omitted).

This court deems it neither compelling nor in the best interests of justice to address these constitutional arguments. There is no evidence in the record that Heldstab meant to exercise his rights of free speech and free expression by utilizing a clear wood preservative to protect the wood trim of his house. Moreover, the alleged classification he attacks, between citizens who are obliged to scrape and paint the exterior wood surfaces of their dwellings and those who are not so obliged, does not exist. All citizens of the City of Milwaukee are required to comply with Milwaukee ordinance 51-32(3). This court thus declines to address those arguments.

By the Court: Orders affirmed.

Not recommended for publication in the official reports.

APPENDIX

STATE OF WISCONSIN-COURT OF APPEALS-FIRST DISTRICT

DAVID J. HELDSTAB,
APPELLANT

-vs-

CITY OF MILWAUKEE,
RESPONDENT

Case No: 1-331775

Motion for extension of time to file petition for review to the Supreme Court with attached affidavit

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APPELLANT HEREBY moves the Court for an extension of time in which to fule his petition for review to the Supreme Court to 30 days after the decision on this motion. Appellant's appeal was decided on July 9, 1986 and no copy of the opinion was ever received until August 19, 1986. A copy of the opinion was never sent to appellant or, if so, it was lost in the mail. Due process will require nothing less than that the appellant be granted this extension by the Court.

Dated September 2, 1986, Milwaukee, Wis.

David Heldstab, pro se
710 East Chambers Street
Milwaukee, Wis. 53212
1-414-263-0866

APPENDIX

AFFIDAVIT

STATE OF WISCONSIN)
(SS
MILWAUKEE COUNTY)

David Heldstab, being first duly sworn, on oath deposes and says that he is the appellant in case number: 1-331775 which was decided on July 9, 1986. Affiant avers that he never receiv- a copy of the opinion on that date or a day later, and that a copy of the opinion was first seen by him on August 19, 1986. Affiant says that he first learned that the case had been decided on August 15, 1986 when he received a notice of remittitur from the clerk of the appellate court, Marilyn Graves late on this Friday afternoon. On Monday, August 18, 1986 affiant called Ms. Graves in Madison, Wisconsin and inquired into the matter of never receiving a copy of the opinion. Ms. Graves assured the affiant that she would send out a copy of the opinion immediately. The copy was duly received the next day on Tuesday August 19, 1986.

David Heldstab

Subscribed and sworn to before me this
3rd day of September, 1986
(s) Steve Holt, attorney

Notary public, State of Wisconsin
My commission is permanent.

APPENDIX

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

To: Hon. Victor Manian
901 N.9th St., Rm. 500A
Milwaukee, WI 53233

Madison, Sept. 16, 1986

Beverly Temple
Asst. City Attorney
200 E. Wells, Rm. 800
Milwaukee, WI 53202

David Heldstab
710 E. Chambers Street
Milwaukee, WI 53212

THE COURT TODAY ANNOUNCED AN ORDER IN YOUR CASE AS FOLLOWS:

No. 85-2315 City of Milwaukee v. Heldstab

The court having considered the motion of defendant-appellant David Heldstab for an extension of time to file a petition for review,

IT IS ORDERED that the motion is denied. This court may not enlarge the time in which to file a petition for review, regardless of the circumstances. See First Wis. Nat. Bank of Madison v. Nicholaou, 87 Wis. 2d 360, 274 N.W. 2d 704 (1979).

Marilyn L. Graves

Clerk of Supreme Court

APPENDIX

THE STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

James D. Jeffries
Administrator, Legal services Division
(608) 266-0332

123 West Washington Ave.
Mailing Address: P.O. Box 7857

July 1, 1986

Wisconsin Court of Appeals
231 East, State Capitol
Madison, WI 53702

Re: City of Milwaukee v. D. Heldstab,
Case No. 85-2315

Dear Honorable Wisconsin Court of Appeals:

This is to advise that we have been furnished with a copy of these pleadings in the above-entitled matter. It does not appear from the face of these pleadings that this office should become involved in this matter at this time. This decision should not be construed to indicate any decision made on behalf of the Attorney General with respect to the merits of the issues raised by these pleadings.

We regret that budget constraints do not allow us to participate in all matters where our participation may be useful.

Sincerely yours,

(s) James D. Jeffries

James D. Jeffries
Ass't. Attorney General
Administrator
Legal Services Division

JDJ/jpm

cc: Grant F. Langley, City Attorney
David Heldstab, Defendant

APPENDIX

710 E. Chambers St.
Milwaukee WI 53212
November 19, 1986

Marilyn L. Graves, Clerk
Court of Appeals
State Capitol, P.O. Box 1688
Madison, WI 53701-1688

Dear Ms. Graves,

You no doubt are by now in receipt of my NOTICE OF APPEAL to the Supreme Court of the United States of Wisconsin Court of Appeals case #85-2315 that was sent to you and dated November 14, 1986.

In regard to this matter and pursuant to the rules of the High U.S. Court which provides that an appellant may ask the clerk wherein the record lies to certify the record or portions thereof and send them up to the clerk of the U.S. Supreme Court.

I would request that you certify the three briefs in the appeal i.e. my first appellate brief (blue book), the City of Milwaukee's brief (red cover) and my reply brief (grey cover) and send them up to:

The Clerk
The United States Supreme Court
1 First St. N.E.
Washington, D.C. 20002

by December 16, 1986. Thank You.

Sincerely,

David J. Heldstab
710 E. Chambers St.
Milwaukee, Wi 53212
1-414-263-0866

APPENDIX

710 E. Chambers St.
Milwaukee, WI 53212
November 19, 1986

Joanne Scheanke
Office of the Clerk of Court
Milwaukee County Courthouse
901 N9 St.
Milwaukee, WI 53202

Dear Ms. Schwanke,

Per our phone conservation of Wednesday afternoon November 19, 1986. I mentioned that I am appealing Milwaukee County Circuit Court case # 1-331775 or really Wisconsin Court of Appeals case # 85-2315 to the United States Supreme Court. The rules there provide that an appellant may ask the clerk of the court wherein the record lies to certify the record or portions thereof and have them sent up to the U.S. Supreme Court clerk. You mentioned that you were in possession of the transcript and not the briefs. Would you please certify then, the transcript and send to:

The Clerk
The United States Supreme Court
1 First St. N.E.
Washington, D.C. 20002

by December 16, 1986. Thank You.

Sincerely,

David J. Heldstab
710 E. Chambers St.
Milwaukee, WI 53212
1-414-263-0866

APPENDIX

STATE OF WISCONSIN-CIRCUIT COURT-MILWAUKEE COUNTY

STATE OF WISCONSIN-COURT OF APPEALS-FIRST DISTRICT

STATE OF WISCONSIN-SUPREME COURT

DAVID J. HELDSTAB,
APPELLANT

-vs-

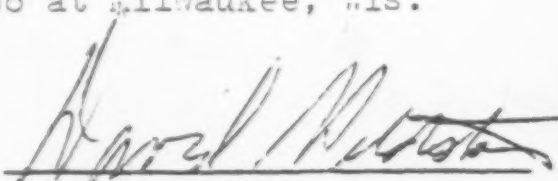
CITY OF MILWAUKEE,
RESPONDENT

Case Numbers:
Circuit court:
1-331775
Court of Appeals:
85-2315

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

PLEASE TAKE NOTICE that David J. Heldstab, the appellant and defendant in the above actions hereby appeals the judgment or orders of the Wisconsin Court of Appeals rendered July 9, 1986 and the denial on the motion for an extension of time to file petition for review by the Supreme Court of the State of Wisconsin rendered September 16, 1986 to the Supreme Court of the United States pursuant to 28 USC sec. 1257.

Dated November 14, 1986 at Milwaukee, Wis.



David Heldstab, pro se
710 East Chambers Street
Milwaukee, Wisconsin 53212
1-414-263-0866

APPENDIX

AFFIDAVIT

STATE OF WISCONSIN)
(SS
MILWAUKEE COUNTY)

David Heldstab, being first duly sworn on oath deposes and says that he has personally mailed a copy of this notice of appeal to the following persons:

1. The adverse party, The City of Milwaukee, Wis.

   Grant Langley, City Attorney
   200 E. Wells St., Room 800
   City Hall
   Milwaukee, Wisconsin 53202

2. The clerk of the Supreme and Appellate Courts for the State of Wisconsin

   Marilyn L. Graves
   Clerk of the Supreme and Appellate Courts
   State Capitol, P.O Box 1688
   Madison, Wisconsin 53701-1688

3. The clerk of Circuit Court for Milwaukee County, wherein the record lies.

   Gary J. Barczak
   Clerk of Circuit Court
   Milwaukee County Courthouse, Room 104
   901 N. 9th St.
   Milwaukee, Wisconsin 53233

at the United States Postal Office at 1620 E. Capitol Dr., Shorewood, Wis at approximately 6:05p.m. on Saturday, November 15, 1986.

Subscribed and sworn to before me this
16th day of November, 1986

(s) Ellen E. Walfurt
Notary Public, State of Wisconsin
My Commission expires August, 1988

David Heldstab
710 E. Chambers St.
Milw., Wis.53212
1-414-263-0866